

October 12, 2006

NEPA Modernization (CE)  
Attn: Associate Director for NEPA Oversight  
722 Jackson Place, NW  
Washington, DC 20503

**RE: Establishing, Revising and Using Categorical Exclusions under the  
National Environmental Policy Act – MLA Comments**

Dear Associate Director:

The Montana Logging Association (MLA) offers the following comments on the above referenced categorical exclusion proposed revision. The MLA represents approximately 600 independent logging contractors, each of which operate a family-owned enterprise that harvest and/or transports timber from forest to mill. In Montana, the vast majority of timberland is owned by government agencies, most notably the U. S. Forest Service. Federal land management policies, directives and guidelines directly impact the welfare of the MLA membership.

During the last several years federal land management agencies have adopted categorical exclusions (CE) as a tool for prompt implementation of resource management actions that ordinarily do not have significant environmental impacts. An environmental assessment (EA) or an environmental impact statement (EIS) is not normally prepared for a categorically excluded action. Significantly, however, the CE rules require that for each and every categorically excluded project, the agency must consider whether there are extraordinary circumstances that would preclude using a categorical exclusion for the project such as the presence of wetlands or endangered species. If there are extraordinary circumstances that indicate the action may be significant, then the CE cannot be used and an EA or EIS is prepared. The Tenth Circuit Court of Appeals recently upheld the 250-acre timber salvage categorical exclusion in Colorado Wild v. U.S. Forest Service, relying in part on the fact that the Service considers whether extraordinary circumstances exist before using a categorical exclusion for any particular project.

Although the legal validity of the CE itself has been upheld, a court in California concluded in Earth Island Institute v. Pengilly, that the use of CE requires public comment and an administrative appeal under the Appeals Reform Act, Pub. L. No. 102-381 ' 322(a). The appeal process can delay implementation of a project for over three months and together with a comment period, the delays can well

exceed over twelve months. While these delays might make sense for projects that may significantly affect the quality of the human environment and require an EA or an EIS, it makes little sense to delay for half a year or more a minor, non-significant project particularly if prompt implementation is needed.

In addition to a more efficient CE process, the issue of cumulative effects must also be revised. In 2004, the Region One Lolo Post Burn salvage and restoration project unfortunately has set a new judicial precedent with regards to cumulative effects and the use of CE for non-significant projects. Originally the cumulative effects order out of Federal District Court affected 27 Region One projects totaling approximately 30 million board feet of timber. Recently, an environmental group has requested information under the Freedom of Information Act on additional Forests impacting additional 20 projects for fiscal year 2007. Region One's timber program already suffers from approximately 560MMBF of wood fiber caught in either appeals or litigation. We simply need every tool the Forest Service has available to effectively improve forest health conditions not only in Montana but also on public lands encompassing the entire West.

Therefore, we sincerely request that CEQ review the following suggested revisions to the NEPA process with regards to CE analysis and implementation.

- Public comment is only required when federal land management agencies adopt a new categorical exclusion rule but it is not required when the CE rule is applied to a project, unless the project is later determined to require an EA or an EIS;
- Revisions to the CE rule must state that there is no avenue for administrative appeal under the Appeals Reform Act, Publ. L. No. 102-381 – 322 of a categorically excluded project;
- If someone objects to the use of a CE, there is no prohibition against judicial review and a lawsuit still may be filed to challenge the action;
- A categorically excluded project that is determined to fit within a CE adopted through the process shall not require further analysis of cumulative effects on the quality of the human environment or require notice and comment under the Appeals Reform act;
- A United States District Court shall complete any judicial review of a categorically excluded by the 60<sup>th</sup> day after the complaint is filed; and
- If for any reason, the United States District court does not complete judicial review by the 60<sup>th</sup> day after the complaint is filed, then the categorically excluded project shall be allowed to proceed whether or not the categorically excluded project was previously enjoined.

Thanks for allowing this opportunity to comment. The effective use of CE's as a resource management tool is integral to a holistic approach to implementing sound stewardship on our public lands.

If you have any questions please feel free to contact me at the MLA Missoula field office at (406) 251-1415 or (406) 253-4485.

Sincerely,

Julia Altemus  
Resource Specialist  
Montana Logging Association